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No. 84-479

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

In Re MOBIL OIL CORPORATION,
ATLANTIC RICHFIELD COMPANY,
GULF OIL CORPORATION,
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
and TEXACO, INC.,
Petitioners.

OPPOSITION OF DOW JONES & COMPANY, INC. TO PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT D. SACK
LINDA NOVAK
PATTERSON, BELKNAP,
WEBB & TYLER
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 541-4000
PHILIP W. BOESCH, JR.
KINSELLA, BOESCH
FUJIKAWA & TOWLE
1875 Century Park
East #1600
Los Angeles, CA 90067
(213) 552-9496

ROBIN B. JOHANSEN*
JOSEPH REMCHO
KATHLEEN J. PURCELL
BARBARA A. BRENNER
REMCHO, JOHANSEN &
PURCELL
220 Montgomery Street
Suite 800
San Francisco, CA 94104
(415) 398-6230

**Counsel of Record*

Attorneys for Dow Jones & Company, Inc.

October 5, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED

1. Whether a Court of Appeals has violated due process or the Federal Rules of Appellate Procedure by granting a petition for mandamus to release documents that the aggrieved party concedes are not commercially sensitive, without calling for a brief to be filed in the precise appellate docket in which the petition is granted and without calling for oral argument, when

   (a) the court has previously considered some 140 pages of briefing by the aggrieved party in four related docket numbers, including a 50-page brief directed solely to the issue;

   (b) failure to grant the petition would cause irreparable injury to public rights of access to judicial documents being considered by the district court and found by that court to be necessary to understanding the proceedings; and

   (c) the protective order under which the documents were originally sealed was intended only to protect commercially sensitive documents.

2. Whether the United States Supreme Court should order the Ninth Circuit to reinstate a district court stay before the Ninth Circuit has acted on pending motions for the same relief and where no arguable injury to rights on appeal will take place for at least 45 days after filing of the mandamus petition.

3. Whether the United States Supreme Court should exercise its mandamus powers to require a Court of Appeals to recall a mandate, when recall of the mandate will have no practical effect on the litigants below and where a motion to recall the mandate is pending before the Ninth Circuit.

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Petitioners.

OPPOSITION OF DOW JONES & COMPANY, INC. TO PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF FACTS

The underlying antitrust action that gives rise to this Petition involves allegations of price-fixing against nine major oil companies. The states of Arizona, California, Florida, Oregon and Washington and the City of Long Beach, California have charged petitioners with a conspiracy to contrive artificially the oil shortages of the mid-1970s and to depress the price of crude oil purchased from certain of the plaintiffs.

The litigation is over ten years old. Millions of public and private dollars have been spent in its prosecution. Discovery has been completed; the case has now reached the adjudicative stage. Motions for summary judgment have been filed, argued, and, in two instances, resolved. But the public remains ignorant of the details of this litigation because most significant documents, including all of the briefs and exhibits in support of and opposition to the motions for summary judgment, remain under seal in district court files.

For more than two and a half years, Dow Jones & Company, Inc.,[1] publisher of *The Wall Street Journal,* has sought access to these documents filed under seal. Twice, Dow Jones petitioned the Ninth Circuit for an order requiring the district court to rule on its motions for access. On September 15, 1983, the Ninth Circuit denied Dow Jones' petition without prejudice to renewal if the district court failed to rule on or before October 31, 1983. Dow Jones'

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[1]The list of subsidiaries and affiliated companies required by Rule 28.1 appears at page 2, footnote 2 of the Opposition of Dow Jones & Company, Inc. to Application for Stay and Temporary Injunctive Relief in Aid of This Court's Appellate Jurisdiction filed October 3, 1984.

Supplemental Appendix (hereinafter "Supp. App.") G. On April 12, 1984, more than two years after Dow Jones was granted permission to intervene, the district court finally ruled that Dow Jones and the public are entitled to contemporaneous access to the summary judgment documents. Petitioners' Appendix (hereinafter "App.") B-1 to B-3.[2] The court's order allowed the petitioner oil companies 60 days in which to submit lists of commercially sensitive documents they argue are entitled to continued protection. The remainder of the documents are to be released 10 days later, on the 70th day. App. B-2 to B-3.

The district court held that Dow Jones is entitled to contemporaneous access to the documents while the antitrust case is still pending and prior to resolution of the parties' motions for summary judgment. That ruling notwithstanding, the court stayed its order pending appeal.[3] App. B-3.

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[2]On the basis of the district court's February 9, 1984 Memorandum of Decision, Dow Jones moved to dismiss as moot its then-pending Ninth Circuit action. Voluntary dismissal was granted by the Ninth Circuit on February 24, 1984.

[3]Petitioners claim that Dow Jones did not oppose issuance of a stay by the district court. In fact, it did.

For the past 29 months Dow Jones' sole objective has been to secure speedy access to documents at issue here. In order to expedite full consideration of the issues, Dow Jones suggested on March 9, 1984 that the court "begin immediately and conclude as rapidly as practicable the document review procedure" set forth in the district court's February 10, 1984 memorandum. Dow Jones then suggested that a stay be entered upon agreement to an expedited appeal, but only *after* the Court "ruled on the motions of defendants and third parties for continued protection as to specific documents." Dow Jones' Response to Stay Motion at p. 3, ¶ 1-2. (9th Cir.). This suggestion of a stay to meet the district court's concerns is a far cry from the stay entered by the district court, which did not even

Despite the court's recognition of a contemporaneous right of access, Dow Jones thus faced further indefinite delay of the date on which the documents would become public. It therefore filed its Emergency Petition for Writ of Mandamus in the Ninth Circuit to vacate the stay of the district court order pending appeal.[4]

On April 26, 1984 the oil companies moved for an extension of time in which to respond to Dow Jones' motion to vacate the stay in the Ninth Circuit. On May 3, 1984 the court granted that motion in part and ordered the oil companies' brief filed on or before May 14, 1984.

On May 14, 1984 the oil companies filed a 50-page brief in opposition to Dow Jones' motion to vacate the stay. In that brief petitioners raised in detail every argument contained in their petition for rehearing and in the petition at issue here. In addition to their 50-page brief, the oil companies filed six other briefs totaling 90 pages, on the issue of the

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require petitioners to begin the task of identifying documents. Moreover, after the court indicated it would begin dispositive hearings on the *Long Beach* cases, Dow Jones filed a motion for expedited implementation of the February 10, 1984 memorandum, noting at p. 5, fn. 2, that "(a) stay pending appeal can no longer be considered appropriate in the *Long Beach* case."

[4]Because of the district court's own uncertainty about the appealability of its order, Dow Jones also filed a notice of appeal from the district court's stay of its order (No. 84-5824) and a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) (No. 84-8076). *See*, the district court's Memorandum to Counsel, dated April 6, 1984, App. B-25 to 26.

Petitioners have repeatedly criticized Dow Jones for failing to file a motion to vacate the stay in petitioners' own appeal docket. *See* Pet. at 21. But petitioners did not file their notice of appeal until 3 days *after* Dow Jones filed its emergency petition for writ of mandamus. At the time, there was no existing appellate docket in which Dow Jones could file.

appropriateness of the district court's stay.[5] Every argument and every case relied on by petitioners was fully presented to the Ninth Circuit at least once prior to the court's resolution of Dow Jones' petition for writ of mandamus and related actions.

On June 19, 1984 the Ninth Circuit granted Dow Jones' emergency petition, stating:

> The petition for a writ of mandamus is granted. The stay pending appeal of the disclosure procedure ordered by the district court is vacated.[6]

On June 26, 1984 the oil companies filed their Petition for Rehearing and Suggestion of Rehearing En Banc. Despite the fact that they had filed seven briefs on the stay issue, petitioners argued that the Ninth Circuit's order was issued "*ex parte*," in violation of their due process rights.

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[5]The other briefs are as follows:

(i) Respondents' Opposition to Application of Dow Jones & Company, Inc. to Vacate Stay Pending Appeal, dated May 14, 1984;

(ii) Appellees' Motion and Memorandum to Dismiss the Appeal, dated May 14, 1984;

(iii) Opposition to Plaintiff States Real Parties in Interest Motion for Leave to File A Brief In Support of Petitioner, dated May 25, 1984;

(iv) Reply to Appellant's Opposition to the Motion to Dismiss, dated June 4, 1984;

(v) Petition of Defendants' Real Parties in Interest for Rehearing, etc., dated June 26, 1984;

(vi) Response of Defendants Below to Dow Jones & Company's Motion for Leave to File An Opposition to Defendants' Petition for Rehearing and Suggestion of Rehearing En Banc, dated July 13, 1984.

[6]Appendix A-1 to Petition for Writ of Mandamus.

At the July 23, 1984 telephone pre-briefing conference in the Ninth Circuit, Dow Jones informed petitioners of its position that the mandate was effective immediately upon issuance of the order granting the petition for writ of mandamus. On August 15, 1984 Dow Jones reiterated its position that the 60-day period for review of the documents would expire on August 18, 1984 and the 70-day period for release of nonsensitive material would expire on August 28, 1984.

On August 23, 1984, the oil companies sought injunctive relief from the district court to prevent the release and publication of the documents. Dow Jones and the plaintiffs stipulated to an order that the stay remain in effect until further ruling from the district court. App. F-1 to F-3. Dow Jones cross-moved for immediate release of the documents. On September 6, 1984 the district court ruled that, even though the Ninth Circuit mandate had issued and been received at the district court, there was a possibility that the Ninth Circuit clerk had issued it by error. App. C-5. The district court, therefore, denied Dow Jones' motion for immediate release of the documents, but ordered that the 60-day review period commence to run on September 6, 1984. App. C-5 to C-6.

The result of the district court's September 6 ruling is that within 60 days—on or before November 5, 1984—the oil companies are to submit a list of those documents on file under seal that they claim contain trade secrets or commercially sensitive material. On the 70th day—November 15, 1984—documents for which petitioners do not claim continued protection are to be released, *unless* the Ninth Circuit rules otherwise.

There are currently pending before the Ninth Circuit the following motions filed by petitioners:

1. Petition for Rehearing and Suggestion of Rehearing En Banc, filed June 26, 1984;
2. Emergency Motion for Clarification of Jurisdiction, for Stay Pending Appeal and Petition for Relief Necessary and Appropriate in Aid of Appellate Jurisdiction, filed August 28, 1984;
3. Emergency Motion to Recall Mandate, filed September 11, 1984.

On September 25, 1984 petitioners filed in this Court their Petition for Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit, their Motion to Accelerate Consideration of a Petition for Writ of Mandamus and an Application for Stay and Temporary Injunctive Relief in Aid of This Court's Appellate Jurisdiction. The Clerk advised counsel for Dow Jones & Company, Inc. that the response to the Application for Stay would be due on October 3, 1984 and that if Dow Jones wished to respond to the Petition for Writ of Mandamus and the Motion to Accelerate, its papers should be filed by October 5, 1984. Because we agree that prompt resolution is appropriate, Dow Jones & Company, Inc. has not filed a separate response to the Motion to Accelerate.

ARGUMENT

For more than two and a half years, Dow Jones has sought access to summary judgment documents filed under seal in the district court. For more than two and a half years, the petitioner oil companies have vigorously resisted such access. Their resistance is not based on a claim that the documents contain trade secrets. As to those, the district court has carefully provided continued protection. Nor is their resistance based on some other claim of privilege that would bar the public from reviewing the documents.

Petitioners' resistance to access is based solely on a claim that the time is not yet ripe for the public to understand the issues in this litigation. That right accrues, they argue, only *after* the district court issues a dispositive ruling. Accordingly, petitioners have stubbornly refused even to begin the process of reviewing the documents for commercially sensitive material, arguing that it is oppressive and burdensome to order them to do so.

On June 19, 1984 a panel of the Ninth Circuit Court of Appeals unanimously disagreed with petitioners. Ruling on Dow Jones' emergency petition for writ of mandamus, the appellate court vacated the district court's stay of its order granting access to the documents. App. A-1. Still, petitioners refused to begin the review process, arguing that by filing a petition for rehearing, they automatically stayed issuance of the Ninth Circuit's mandate. When they learned that the mandate had indeed issued, they appealed to the Ninth Circuit, twice setting deadlines by which, according to their own fiat, the appellate court should have acted. When the court failed to meet those deadlines, petitioners came to this Court seeking extraordinary relief that is neither warranted nor appropriate. In the course of doing so, they have seriously misrepresented not only the nature of the documents at issue in the case, but the actions of the Ninth Circuit. Because petitioners neither deserve nor require the extraordinary remedy of mandamus, the writ should be denied.

I

MANDAMUS IS NEITHER NECESSARY NOR APPROPRIATE

The extraordinary remedy of mandamus is unwarranted and inappropriate in the context of this case. Petitioners

have sought to inject a note of urgency and importance into these circumstances—and thereby capture the attention of this Court—by suggesting first, that the documents at issue here are mere discovery documents similar to those in *Seattle Times Co. v. Rhinehart*, — U.S. —, 104 S.Ct. 2199 (1984) and second, that unless this Court acts now, they will lose their rights on appeal. Neither claim is true.

A. The Documents At Issue Here Are Summary Judgment Papers, Not Mere Discovery Documents

Petitioners have seriously misrepresented to this Court the nature of the documents that will be disclosed on November 15 if the Ninth Circuit declines to act. They are not mere discovery documents exchanged secretly among the parties under the district court's protective order.[7] They are documents submitted to the district court, accompanied by a demand that the court adjudicate this case upon them.[8]

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[7]Petitioners imply, for example, that Dow Jones' request for "access to all protected discovery" was granted by the April 12 order. Pet. at 4-5. Dow Jones did originally seek access to all discovery, but it quickly narrowed its request to briefs and exhibits in support of or opposition to summary judgment, as well as plaintiffs' pretrial briefs, which served as responses to petitioners' summary judgment motions. It was this far narrower request, limited to adjudicative documents filed under seal with the court, that the district court granted. App. B-1 to B-2. On page 26 of their petition, petitioners again state: "The District Court's April 12 ruling holds that pretrial civil discovery is presumptively open to the public . . .". *See also*, Pet. at 25 (petitioners are threatened with disclosure of "confidential, private files that they have been compelled to disclose to adverse parties under the liberal federal discovery rules").

[8]The district court described the documents as follows:

> It is true, as the defendants point out, that most of the docket filings in MDL-150 have not been designated "Confidential." However, it also is true that what is sealed constitutes, overall, the most significant aspects of the litigation: how the plaintiffs

Denominating documents here in issue as "discovery material," as petitioners repeatedly do, is not helpful. A document obtained through discovery covered by a valid protective order may be a "raw fruit of discovery" (whether or not filed in court), or it may be submitted to the court as part of a substantive motion or in preparation for trial, or it may be presented at trial but excluded for evidentiary reasons, or it may be considered by a judge or jury and later become part of a record on appeal. In each case it is "discovery material" in the sense that it was surrendered during discovery under a protective order. But that does not aid in the inquiry as to whether it is subject to the presumption of public access and thus properly ordered unsealed.

Unlike mere discovery exchanged among the parties, documents obtained through discovery but employed in pretrial adjudication proceedings have uniformly been held to be subject to public access.* *See, e.g., In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1309 (7th Cir. 1984); *Associated Press v. United States District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983); *Joy v. North*, 692 F.2d

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intend to prove their cases and why they may or may not be able to show actionable wrongdoing. App. B-11.

*Thus, the cases on which petitioners principally rely have no bearing whatsoever on the issue at bar; they concern documents merely exchanged by the parties during discovery. *Seattle Times Co. v. Rhinehart*, ___ U.S. ___, 104 S.Ct. 2199 (1984); *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981); *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458 (10th Cir. 1980); *Wilk v. American Medical Association*, 635 F.2d 1295 (7th Cir. 1980); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979); *International Products Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963); *Times Newspapers Ltd. (Gr. Brit.) v. McDonnell Douglas Corp.*, 387 F.Supp. 189 (C.D. Cal. 1974).

880, 893-94 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1498 (1983).

A vast difference exists between discovery documents and documents filed in support of or in opposition to motions for summary judgment. The former are in fact exchanged informally among the parties. They generally arrive in boxes, unindexed and unauthenticated. Many, if not most, are irrelevant or immaterial to the issues in the case.

By contrast, documents filed in support of or in opposition to summary judgment should be both relevant and otherwise admissible. Fed.R.Civ.P. 56(e). They constitute the core of each party's case and represent counsels' best efforts to present their evidence in written form. They are the result of the winnowing process that occurs *after* discovery as the parties prepare and submit their case for adjudication. These are the documents on which each side relies to prove its case. They are court documents, *presented for judicial action*, with counsels' implicit representation that they constitute relevant, material, admissible evidence.

B. Petitioners' Interests Will Be Adequately Preserved Through The Ordinary Course of Appeal

There currently are pending in the Ninth Circuit three proceedings which directly address the issues that the oil companies ask this Court to resolve by way of extraordinary writ of mandamus:

1. The oil companies' petition for rehearing from the June 19, 1984 Order of the Ninth Circuit granting Dow Jones' petition for mandamus and vacating the April 12, 1984 stay;

2. The oil companies' motion for clarification dated August 27, 1984; and

3. The oil companies' September 10, 1984 motion to withdraw the mandate.

Each of these proceedings may afford the oil companies the relief they seek here. Moreover, if, after the Ninth Circuit rules, the oil companies remain unsatisfied, they may then properly petition for certiorari in this Court. *Will v. United States*, 389 U.S. 90, 94-95 (1967); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 251 (1957). Thus ordinary appellate procedures, if followed, will provide ample opportunity to correct any error in the Circuit Court.[10]

Under these circumstances, mandamus is utterly unnecessary and would be highly inappropriate. Rule 26 of the Supreme Court Rules, setting forth the considerations governing issuance of extraordinary writs, expressly provides that "[t]o justify the granting of any writ under [28 U.S.C. § 1651(a)], it must be shown . . . that adequate relief cannot be had in any other form or from any other court." *See also, In re Chicago, Rock Island & P.R. Co.*, 255 U.S. 273, 275-76 (1921); *Matter of Tiffany*, 252 U.S. 32, 37 (1920); *Alexander v. Crollott*, 199 U.S. 580 (1905). It is well settled that the writ of mandamus is not to be used as a substitute for appeal. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). The writ "should be resorted to only where appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). This rule comports with the general principle governing mandamus proceedings that "whatever can be done without the employment of that extraordinary writ, may not be done with it." *Helstoski v.*

[10]Respondent, of course, does not believe that the Ninth Circuit has erred.

Meanor, 442 U.S. 500, 505 (1979) (emphasis deleted), *quoting Ex parte Rowland,* 104 U.S. 604, 617 (1882).

It is not unusual for courts, at least initially, to refuse mandamus when proceedings still pending in the court below might resolve the issue. The Ninth Circuit did exactly that when it first considered this case in September, 1983. Supp. App. G. *See also, Merritt-Chapman & Scott Corp. v. Kent,* 309 F.2d 891, 891-92 (6th Cir. 1962), *cert. dismissed,* 372 U.S. 982 (1963). *Cf., De Beers Consolidated Mines v. United States,* 325 U.S. 212, 217 (1945) (Court found it unnecessary to consider those issues that were still pending in the court below).

The oil companies' claim that a refusal by this Court to issue mandamus will cause them inconvenience and expense is exaggerated and does not justify substituting mandamus for the ordinary course of appeal. Their claim that they face disclosure "of confidential, private files" (Pet. at 25) is quite simply false.

First, it is well-established that the inconvenience and expense that a party suffers as a result of pursuing the normal course of an appeal will not justify issuance of a writ of mandamus. *Schlagenhauf v. Holder, supra,* 379 U.S. at 110; *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383 (1953); *Ex parte Fahey, supra,* 332 U.S. at 260. *See also, Plekowski v. Ralston-Purina Co.,* 557 F.2d 1218, 1220 (5th Cir. 1977); *In re Estelle,* 516 F.2d 480, 484 (5th Cir. 1975), *cert. denied,* 426 U.S. 925 (1976).

Second, the oil companies will not, in fact, suffer any undue burden or expense. These documents represent the core of each side's case submitted to the court for adjudication on summary judgment. Counsel must already be intimately familiar with them.

At least some of the oil companies have already reviewed the documents for confidential business information in connection with a motion for access to documents filed by the State of Alaska in MDL-150.[11] Moreover, under the May 1974 protective order the oil companies already should have, but apparently have not, reviewed these documents for confidentiality. The protective order, by its terms, was designed to protect "confidential trade secrets and information of commercial significance to competitors" under Rule 26(c) of the Federal Rules of Civil Procedure. App. B-7. It should never have been used as petitioners did here, to stamp confidential virtually every document in the case, including summary judgment motions, news releases and even copies of federal regulations.[12]

The documents to be released pursuant to the vacation of stay are, by petitioners' own admission, not trade secrets and therefore not subject to any protection whatsoever. That is, the district court's order requires that within 60 days petitioners cull out those documents that they believe are commercially sensitive and submit them to the court. The remainder are, by definition, not even allegedly commercially sensitive. There is absolutely no reason to stay release of documents that petitioners admit are not prop-

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[11]Opposition of Plaintiffs City of Long Beach and State of California, Real Parties in Interest, to Emergency Motion to Recall Mandate and Petition for Clarification of Mandate (filed in the Ninth Circuit September 19, 1984) at 5-6, attached as Supplemental Appendix H hereto.

[12]As the district court said:

> At this juncture, it is clear that some of the sealed information never would have qualified for protection under the terms of P.T.O. No. 2 or Rule 26(c)(7). It is quite likely that most of the other sealed documents have lost their character as commercially sensitive due to the passage of time. App. B-12.

erly covered by the protective order. If the documents do not even meet the requirements of Rule 26(c), they do not belong under seal in court files.

Thus, the only injury petitioners conceivably could suffer, in the remote event that the Ninth Circuit fails to act, is limited to the issue of timing of release of the documents. Petitioners have conceded before the Ninth Circuit that the public is entitled to access to these documents following a dispositive ruling in the district court.[13] They merely argue that access now, while summary judgment motions are pending, is premature.[14] We demonstrate below why petitioners are unlikely to succeed on the merits of their argument on appeal. For purposes here, the issue of whether petitioners' limited appeal is worth preserving—when to do so would irretrievably deny to the press and public their right of contemporaneous access to court proceedings—is one best left to the Ninth Circuit Court of Appeals.

II

THE NINTH CIRCUIT NEITHER ACTED EX PARTE NOR ABUSED ITS DISCRETION IN VACATING THE STAY

Petitioners argue that the Ninth Circuit not only exceeded its authority and abused its discretion in vacating the stay, but that it did so *ex parte*. The first two claims are wrong as a matter of law. The last claim is wrong as a matter of fact.

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[13] *In Re: Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation* (No. 84-5878), Brief of Appellants at 8, 15, 19, 40.

[14] As to some of the documents, petitioners cannot make even this argument. The district court has already ruled on two motions for summary judgment, but the briefs and supporting documents remain under seal. Supp. App. I & J.

A. The Petitioners Were Given Ample Opportunity to Be Heard In the Ninth Circuit

Petitioners filed in the Ninth Circuit no fewer than seven separate briefs on the issue of whether the district court's stay pending appeal should be vacated. The fact that petitioners' briefs may have been filed in different dockets from the petition for writ of mandamus is of absolutely no consequence. Uncertain of the basis for appellate jurisdiction and because the district court itself had recommended three different methods of obtaining review, Dow Jones had filed a notice of appeal and a petition for permission to appeal under 28 U.S.C. § 1292(b). Dow Jones' application to vacate the stay—filed in the appeal docket—was styled, in the alternative, as an emergency petition for writ of mandamus. Although the petition for mandamus was assigned a separate docket number in the Ninth Circuit, each of the dockets addressed the same issue: whether the stay pending appeal should be vacated. The *same panel* ruled *on the same day* on each of the three dockets, granting the petition for writ of mandamus, denying the petition for permission to appeal, and dismissing Dow Jones' appeal of that portion of the district court's decision staying disclosure pending appeal. App. A-1, D-1, E-1.

The Ninth Circuit even granted petitioners an extension of time in which to respond to Dow Jones' efforts to vacate the stay. On April 26, 1984 the oil companies moved for an extension of time in which to respond to Dow Jones' application to vacate stay. On May 3, 1984, the Ninth Circuit granted the motion, allowing petitioners until May 14, 1984 to respond.

Petitioners' argument that they were entitled to oral argument on the Ninth Circuit mandamus petition is as spe-

cious as their claim that they were denied an opportunity to respond. Neither the Constitution of the United States, the Federal Rules of Appellate Procedure nor the Ninth Circuit Local Rules require oral argument on a petition for writ of mandamus, as this Court's own practice of summary reversal on petitions for certiorari demonstrates. *Federal Communications Com. v. Station WJR,* 337 U.S. 265, 274-83 (1949) ("Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised."); *George W. B. Bryson & Co., Ltd. v. Norton Lilly & Co., Inc.,* 502 F.2d 1045, 1050-51 (5th Cir. 1974) (constitutional; "Oral argument is not always helpful, nor is it the *sine qua non* of fair dispositions."); *Groendyke Transport, Inc. v. Davis,* 406 F.2d 1158, 1162-63 (5th Cir.), *cert. denied,* 394 U.S. 1012 (1969); *Magnesium Casting Co. v. Hoban,* 401 F.2d 516, 518 (1st Cir. 1968), *cert. denied,* 393 U.S. 1065 (1969). *See also,* Supreme Court Rule 27 (Court *may* order argument on application for extraordinary writ).

In *N.L.R.B. v. Local No. 42, Int. Ass'n of Heat & F. I. & A. Workers,* 476 F.2d 275 (3d Cir. 1973), the Third Circuit specifically held that Rule 34, Fed.R.App.P., does not require oral argument in every case:

> Such a rigid requirement would be incompatible with the need of the judiciary to husband its time by limiting argument to those cases in which the court believes it will aid in the quality of the decision making process. 476 F.2d at 276.

Flexibility is particularly critical where, as in the case at bar, time is of the essence, "important public policy issues are involved", and the case is one "where rights delayed

are rights denied." *Groendyke Transport, Inc. v. Davis, supra,* 406 F.2d at 1162.

B. The Ninth Circuit Did Not Exceed Its Jurisdiction In Vacating the Stay

The oil companies suggest that mandamus is appropriate here because the Ninth Circuit exceeded its jurisdiction. Vacating the district court's stay, they argue, was not an act in aid of appellate jurisdiction and, therefore, was not within the Circuit Court's power under 28 U.S.C. § 1651(a). Pet. at 2, 16, 22. This construction of the Circuit Court's mandamus power is unprecedented[15] and plainly wrong. The propriety of the Ninth Circuit's decision is solely a matter of discretion. That court clearly had jurisdiction to act. *Schlagenhauf v. Holder, supra,* 379 U.S. at 111 n.8 ("The issuance of this extraordinary writ is itself generally a matter of discretion."). *Accord, Helstoski v. Meanor, supra,* 442 U.S. at 506; *Kerr v. United States District Court,* 426 U.S. 394, 403 (1976). "Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them." *La Buy v. Howes Leather Co., supra,* 352 U.S. at 254-55. *See also, In re United States,* 348 F.2d 624, 625 (1st Cir. 1965). *Cf., United States v. Bondey,* 171 F.2d 642 (2d Cir. 1948) (per curiam) (mandamus denied in a criminal case because the Court of Appeals would not at any point have obtained appellate jurisdiction over the issue). The oil companies concede that the Ninth Circuit had authority to vacate the stay in conjunction with its appellate review of the district court's April 12 disclosure order. Pet. at 21.

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[15]The oil companies do not attempt to support their interpretation with precedent.

It therefore had authority under 28 U.S.C. § 1651 to issue mandamus.

The Ninth Circuit acted within the scope of its authority even under the oil companies' unprecedented interpretation of the phrase "in aid of jurisdiction" in § 1651. Only by granting this preliminary relief could the Ninth Circuit preserve Dow Jones' and the public's clear and substantial interest in prompt and contemporaneous access.

The oil companies are also wrong in contending that the Ninth Circuit abused its discretion. To the contrary, the Ninth Circuit's order was entirely proper to preserve Dow Jones' right to contemporaneous access, to correct a district court decision that was clearly erroneous, and to address the district court's continued denial and delay of access over a two-year period.

The right to contemporaneous access was and is particularly urgent because the district court was proceeding to rule on summary judgment motions.[16] These decisions of the district court, dealing with the very heart of the *Long Beach* case, are based on secret documents that the district court in its April 12 decision held are presumptively public but refused to release pending appeal in the Ninth Circuit.

Mandamus was also proper to correct the district court's clear error and abuse of discretion in applying the standards for a stay pending appeal.[17] A stay of proceedings

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[16]The district court has since decided two motions for summary judgment in the *Long Beach* case. Supp. App. I & J.

[17]The oil companies argue that a district court order entering a stay pending appeal "could rarely, if ever" be subject to mandamus because entry of a stay is an exercise of discretion. Pet. at 20-21. The authorities that they cite do not support this proposition. Neither *Will v. United States*, 389 U.S. 90 (1967) nor *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978) nor *Allied Chemical*

pending interlocutory appeal is the exception, not the rule. *Fitzgerald v. Compania Noviera La Molinera*, 394 F.Supp. 402, 412 (E.D. La. 1974) (motion to certify appeal denied January 15, 1975). *See also, Brotherhood of Railway & S. S. Clerks, etc. v. National Mediation Board*, 374 F.2d 269, 275 (D.C. Cir. 1966).[18] Such orders are by no means insulated from appellate review.

Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) involved a stay pending appeal. In *Becker v. United States*, 451 U.S. 1306, 1312 (1981), Justice Rehnquist, acting as Circuit Justice, entered a stay despite the fact that both the district court and the Court of Appeals had denied applications for a stay. In *Matter of Combined Reduction Co.*, 557 F.2d 179, 193 (9th Cir. 1977), the Ninth Circuit found no abuse of discretion and noted that because there was no record of appeal from denial of a stay, it could not properly consider the matter. In *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission*, 260 U.S. 212, 219 (1922), the Court expressly recognized that although the court that has considered a case on the merits is generally in a better position to assess the propriety of a stay, reconsideration by a higher court is in some cases desirable. Here, of course, due to the history of the litigation, the Ninth Circuit panel that vacated the stay was already familiar with the merits of the case.

[18]Petitioners assert that stays pending appeal have been entered under similar circumstances. Pet. at 22. The cases cited to support that assertion do not sustain it. *United States v. Dorfman*, 690 F.2d 1217 (7th Cir. 1982) involved a criminal defendant's interlocutory appeal of the denial of his suppression motion under the Fourth Amendment. There is no indication in the opinion that a stay was either sought or discussed, though presumably the material sought to be excluded was not introduced at trial while the appeal was pending. The documents that were sealed pending appeal in *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458 (10th Cir. 1980), were sealed on the urging of *all* parties. 616 F.2d at 460. While a stay pending appeal was entered in *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1307 n.8 (7th Cir. 1984), nothing in the Court of Appeals' opinion indicates whether the stay was entered over the objection of one or more of the interested parties. In both *Providence Journal v. F.B.I.*, 595 F.2d 889, 890 (1st Cir. 1979) and *Antonelli v. F.B.I.*, 553 F.Supp. 19, 25 (N.D. Ill.

While the standard of review of a stay pending appeal is sometimes said to be whether the district court abused its discretion, *Washington Metropolitan Area Transit Commission v. Holiday Tours,* 559 F.2d 841, 845 (D.C. Cir. 1977), the actual review entails a detailed analysis of the factors relevant to determining whether a stay is appropriate in the first instance. *In re Letters Rogatory from the Tokyo District,* 539 F.2d 1216, 1220 (9th Cir. 1976); *United States v. First National Bank of Black Hills,* 619 F.2d 774 (8th Cir. 1980). Those factors are:

> (1) Has [the party seeking the stay] made a strong showing that it is likely to prevail on the merits of its appeal? . . .
>
> (2) Has the [party seeking the stay] shown that without such relief, it will be irreparably injured? . . .
>
> (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . .
>
> (4) Where lies the public interest?
>
> *Washington Metropolitan Area Transit Commission v. Holiday Tours, supra,* 559 F.2d at 843, *quoting Virginia Petroleum Jobbers Ass'n v. F.P.C.,* 259 F.2d 921, 925 (D.C. Cir. 1958).

The case law generally requires a strong showing that the appellant is likely to prevail on the merits. *See, Washington Metropolitan Area Transit Commission v. Holiday Tours, supra,* 559 F.2d at 843; *Warm Springs Dam Task Force v. Gribble,* 565 F.2d 549, 551 (9th Cir. 1977) (standard applied re injunction pending appeal). The required showing is reduced to that of "a substantial case on the

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1982), *cert. denied,* ___ U.S. ___, 104 S.Ct. 2399 (1984), the defendants demonstrated a likelihood of success on appeal and the stays were premised on specific findings that denying a stay would irreparably harm the defendants while granting it would only minimally harm the plaintiffs.

merits" or "serious legal questions presented" only when all the other factors strongly favor a stay. *McSurely v. McClellan,* 697 F.2d 309, 317 (D.C. Cir. 1982); *Providence Journal v. F.B.I.*, 595 F.2d 889, 890 (1st Cir. 1979). And where the right vindicated by the district court's order is of paramount constitutional significance, the burden on the party supporting the stay is increased. *Evans v. Buchanan,* 455 F.Supp. 705, 708 (D.Del. 1978). *Cf., Florida Businessmen for Free Enterprise v. City of Hollywood,* 648 F.2d 956, 958 (5th Cir. 1981) (irreparable injury to party seeking stay where First Amendment freedoms lost).

As we demonstrate below, petitioners have very little likelihood of prevailing on the merits, and as discussed above, far from being irreparably injured, they risk only disclosure of documents that could never have met the test of Fed. R. Civ. Pro. 26(c). Finally, the public interest demands access to documents in this case that has been litigated for ten years by public officials on the public behalf. The Ninth Circuit properly considered and corrected the district court's clear error in assessing these factors.

C. Petitioners Are Not Likely to Succeed on the Merits of Their Appeal

Petitioners argue that they are entitled to a stay pending appeal—while the antitrust action continues and summary judgment motions are heard—because they are likely to succeed on the merits. They argue that the district court's April 12 decision is "vulnerable" for three reasons:

1. Because it is not supported by case law;

2. Because contemporaneous access to court documents, prior to a dispositive ruling, does nothing to promote the purpose of the public access right, which is to monitor judicial performance;

3. Because the ruling "effectively nullifies" umbrella protective orders. Pet. at 27.

We address each of these arguments briefly below.

1. The case law fully supports the April 12 decision

Petitioners do not dispute, nor can they, that the public is entitled to access to court proceedings. *See, e.g., Press-Enterprise Co. v. Superior Court of California*, — U.S. —, 104 S.Ct. 819, 828 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The issue as joined in the Ninth Circuit is solely whether the right of access arises at the adjudicative stage of civil litigation or only when, if ever, adjudication is complete.

The district court's ruling that the right of access arises at the adjudicative stage is amply supported by the case law. Indeed, every case in which the issue was considered (including one decided after the district court ruled) has, like the court below, emphasized the need for "contemporaneity." The Seventh Circuit recently stated in a civil proceeding, for example:

> [T]he presumption of access normally involves a right of *contemporaneous* access: disclosure of the contents of the Report [to which access was sought] would have been proper at the time the motion [to dismiss] was still pending [*i.e.*, prior to decision].
>
> *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1310 (7th Cir. 1984) (emphasis in original, citations omitted).

See also, Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179-80 (6th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 1595 (1984) (civil proceeding); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980) (Brennan,

J., concurring); *In re Oliver*, 333 U.S. 257, 270 (1948); *In re Application of National Broadcasting Co.*, 635 F.2d 945, 952 (2d Cir. 1980); *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981); *Newman v. Graddick*, 696 F.2d 796, 800 (11th Cir. 1983) (civil proceeding); *Associated Press v. United States District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983).

The only cases cited by petitioners (*see* Pet. at 27 n. 37) that even begin to address the conclusion of the district court are an opinion of the District of Columbia Court of Appeals, which was vacated and remanded,[19] and dicta from a case in the Eastern District of Pennsylvania.[20] The overwhelming weight of the case law supports the April 12 decision.

Nor does *Seattle Times v. Rhinehart*, — U.S. —, 104 S.Ct. 2199 (1984), weaken the district court's opinion, as petitioners suggest. *Seattle Times* dealt solely with whether a party may disseminate documents obtained in pretrial discovery, but never filed with the court. Nowhere did the Court hold or suggest that common law rights of access are nonexistent prior to trial or dispositive ruling, as petitioners claim. Rather, the Court simply said that

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[19] *Tavoulareas v. The Washington Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984).

[20] *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F.Supp. 866 (E.D. Pa. 1981). Petitioners state that the district court acknowledged three contrary cases—*Tavoulareas* and *Zenith*, *supra*, and *Wilk v. American Medical Association*, 635 F.2d 1295 (7th Cir. 1980). The district court's opinion contains no such acknowledgment regarding *Wilk*, and *Wilk* itself granted access to a collateral litigant to pretrial discovery materials. The case had nothing to do with documents filed under seal with a court. In any event, if *Wilk* is read to suggest that contemporaneous access is not required, to that extent it has been overruled in *In re Continental Illinois Securities Litigation*, *supra*, 732 F.2d at 1310.

"restraints placed on discovered, but not yet admitted, information are not a restriction on a *traditionally public source of informaton.*" 104 S.Ct. at 2208 (emphasis added). Court files, on the other hand, are a "traditionally public source of information," particularly when they contain motions for summary judgment and supporting documents that will form the basis for dispositive rulings in cases of major public concern. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *In re Oliver, supra*, 333 U.S. at 270 n. 24; *United States v. Criden, supra*, 648 F.2d at 819; *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964); *In re Chambers*, 44 Fed. 786 (1891).

2. The policies behind public access require access at the adjudicative stage of court proceedings

Petitioners argue that since "the undisputed purpose of the public access right is to allow monitoring of judicial performance," there is no logic in extending public access to court documents until they are the subject of a dispositive judicial ruling. Pet. at 27. Both Dow Jones and the district court dispute the assertion that the sole purpose behind the right of access is to monitor judicial performance. As the district court pointed out, "[t]he rationale for public access is especially apropos . . . when the plaintiffs' lawyers are public officials." App. B-10. And there exist other important policy reasons for the right of access, such as the need for an outlet for community concern and the fact that open courts promote true and accurate factfinding. *Brown & Williamson Tobacco Corp. v. F.T.C., supra*, 710 F.2d at 1178 and cases cited therein.

But even if the need to monitor judicial performance were the sole reason for the right of access, that need—par-

ticularly in *this* case—cannot be served without contemporaneous access at the adjudicative stage. It is during such proceedings that the public most needs to be able to "watch and participate." *Id.* at 1179. The case has gone on for over ten years. The very length of time it has taken to adjudicate the matter is cause for public concern. But without access to the documents and to the briefs that explicate the issues, the public cannot assess whether the time that has elapsed thus far is justified or not. In this case, the *absence* of a dispositive ruling is an aspect of judicial performance that the public is entitled to monitor and to understand.

3. Access at the adjudicative stage in no way jeopardizes the usefulness of umbrella protective orders

Finally, petitioners argue that the district court's ruling will be the death-knell of umbrella protective orders in complex litigation. Pet. at 27-28. The ruling, however, does nothing to protective orders or their usefulness during discovery. It simply holds that when the case reaches the adjudicative stage, the review process must begin, something that petitioners are apparently loathe to do. A protective order denying public access to discovery proceedings may only issue for "compelling reasons." *American Telephone and Telegraph Co. v. Grady,* 594 F.2d 594, 596 (7th Cir.), *cert. denied,* 440 U.S. 971 (1979). In antitrust litigation, those reasons will normally have to do with trade secrets or commercially sensitive material, as they did here.[21] The district court has provided a process whereby such material will be protected. All that the district court's order requires petitioners to do is to review the material and separate it

[21]The original protective order in the antitrust case was entered at petitioners' request in order "to prevent the imminent public exposure of . . . confidential trade secrets and information of commercial significance to competitors." App. B-7.

into two categories: commercially sensitive and commercially nonsensitive. It is a task petitioners must do sometime before trial, unless they intend to request an order sealing every exhibit at trial.[22]

Petitioners' likelihood of success on the merits is slim indeed. It is certainly no excuse for interminable delay of the public's ability to monitor these proceedings.

III

FILING OF A PETITION FOR REHEARING DOES NOT AUTOMATICALLY STAY ISSUANCE OF A WRIT OF MANDATE

Petitioners argue that the Ninth Circuit mandate was issued in violation of Fed.R.App.P. 41(a). Pet. at 16-19. Under that rule, they argue, filing of their petition for rehearing should have automatically stayed issuance of the mandate. Pet. at 16-17.

Rule 41(a) reads in pertinent part as follows:

> The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. . . . The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. . . .

Rule 41 is not applicable here for two reasons: first, because it governs appeals and not mandamus, and second, because it applies only to a final judgment, not interim orders of the type at issue here.

A comparison of the appeals process with the process for mandamus demonstrates that Rule 41 does not apply to petitions for writs of mandamus. The 21-day period be-

[22]The order does *not* require petitioners to review every document produced in discovery, but only those attached as exhibits to the motions for summary judgment and pretrial briefs on file with the court. App. B-1 to B-2.

tween entry of judgment and issuance of mandate contained in Rule 41 makes perfect sense on appeal, but it is utterly unworkable in the context of an emergency petition for writ of mandamus. On an appeal, the automatic 21-day period allows both sides time to decide whether to file a petition for rehearing, seek certiorari in the Supreme Court, or simply let the matter end. If either party files a petition for rehearing, issuance of the mandate is automatically stayed pursuant to Rule 41. But emergency mandamus proceedings by definition require expedited review. They cannot afford the 21-day grace period allotted to an appeal. Mandamus is an extraordinary remedy, to be used only in the most egregious and compelling circumstances. *See, Sacramento Bee v. United States District Court,* 656 F.2d 477, 480-81 (9th Cir. 1981), *cert. denied,* 456 U.S. 983 (1982). *Any* delay in the issuance of the court's mandate may cause irreparable harm to the prevailing party's rights. This is particularly so when those rights are grounded, as they are here, in the First Amendment. *See, e.g., Newman v. Graddick,* 696 F.2d 796, 799 (11th Cir. 1983).

Petitioners argue also that because Rule 41 appears under the title "General Provisions," it applies to all proceedings—emergency or otherwise—and that special proceedings not subject to the general provisions bear their own titles. Pet. at 17 n.19. But as petitioners themselves note, writs of mandamus and prohibition bear their own title—"Title V. Extraordinary Writs"—and receive special treatment under the Rules of Appellate Procedure. Rule 21 recognizes the need for speed in such cases by giving writ proceedings precedence over civil cases. It would be anomalous indeed for the court, once it granted such a writ on an emergency basis, to assume that its mandate will automatically be stayed for 21 days.

In cases in which time is of the essence, both the Ninth Circuit and other Courts of Appeals grant writs of mandamus without specifying when the mandate shall issue. *United States v. Harper*, 729 F.2d 1216, 1217, 1226 (9th Cir. 1984) (in case set for trial "a few weeks hence," writ directed to district court "should issue"); *In re Greensboro News Co.*, 727 F.2d 1320, 1322, 1326 (4th Cir. 1984), *petition for cert. filed*, 52 U.S.L.W. 3908 (U.S. June 4, 1984) (No. 83-1995) (stay of closed *voir dire* proceedings to consider press access claim implicitly vacated immediately upon issuance of order denying claim); *Ohio Environmental Council v. United States District Court*, 565 F.2d 393, 398 (6th Cir. 1977) (district court stay of proceedings vacated; district court ordered to proceed "as expeditiously as possible"); *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006-09 (3d Cir. 1976) (district court protective order vacated on First Amendment grounds); *Local 391, International Bro. of Teamsters, Etc. v. Ward*, 501 F.2d 456, 459 (4th Cir. 1974) (issuing writ of mandamus "directing respondent [court] forthwith to hear and determine" pending motions).[23]

Petitioners argue that application of Rule 41 to writs of mandamus is necessary to preserve their right to petition for rehearing or certiorari. Pet. at 17. At the same time, however, they acknowledge that "[a] court of appeals is

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[23]Even on appeal, the 21-day stay of mandate does not necessarily mean that a stay pending appeal automatically remains in effect until issuance of the mandate. In *American Telephone and Telegraph Co. v. Grady, supra*, 594 F.2d at 597, the Court of Appeals affirmed a district court's modification of a protective order similar to the one at issue here, but specifically stated that "the stay order by this Court pending the disposition of the appeal shall remain in effect until the mandate issues."

free to dispense with the . . . automatic stay pending disposition of a petition for rehearing," provided it so states in an order. Pet. at 18. If that is true, as it unquestionably is under Rule 41(a), then it makes no difference whether the court expressly orders that the mandate issue immediately or assumes that it shall do so under the established practice in that circuit. The losing party's petition for rehearing or certiorari is equally preempted by immediate issuance of the mandate.

Finally it is clear, as even petitioners admit, that Rule 41 applies only to final judgments and not to interim orders. Because the Ninth Circuit order was an order vacating a stay pending appeal, it cannot be viewed as the kind of final judgment to which Rule 41 applies. The order in no way resolves the issue of public access to these documents. It simply orders the district court to set in motion a schedule for review of those documents. In that sense, the order is much more like the interim order issued in *York Intern. Building v. Chaney,* 527 F.2d 1061 (9th Cir. 1975), in which the Ninth Circuit said:

> Additionally, our February 25th Memorandum was in response to a motion and so was not a "judgment" under Rule 41, FRAP. As such, it took effect immediately upon being filed in this court and did not become subject to any stay of mandate or similar abeyance. The "judgment" mentioned in Rules 37 and 41, FRAP, is obviously the final judgment on appeal, not an intermediate order, such as we entered on February 25th. 527 F.2d at 1066.

Had petitioners desired a stay pending resolution of their petition for rehearing they should have asked for one at the time rather than relying on their own interpretation of the Federal Rules of Appellate Procedure. The order

in the instant case was admirably suited to such a request. It merely set in motion a schedule of events, the first of which would not occur for 60 days. Petitioners had ample time to move for a stay or to seek clarification of the Ninth Circuit order granting mandamus. They chose not to, and so bought themselves what they perenially appear to be seeking throughout these proceedings: a bit more time. Instead of beginning the document review process on June 19, 1984, when the Ninth Circuit issued its order, they waited. Now that they have been told that their time began to run on September 6, 1984—nearly two and a half months later—they come to this Court complaining that they have been denied rights to which they were never entitled in the first place.

CONCLUSION

The writ should be denied.

Dated: October 5, 1984

Respectfully submitted,

ROBIN B. JOHANSEN*
JOSEPH REMCHO
KATHLEEN J. PURCELL
BARBARA A. BRENNER
REMCHO, JOHANSEN & PURCELL
ROBERT D. SACK
LINDA NOVAK
PATTERSON, BELKNAP, WEBB & TYLER
PHILIP W. BOESCH, JR.
KINSELLA, BOESCH, FUJIKAWA & TOWLE
Attorneys for Dow Jones & Company, Inc.

**Counsel of Record*

Supplemental Appendix G

United States Court of Appeals

For the Ninth Circuit

No. 83-7634
MDL# 150 WPG
Central California
Dow Jones & Company, Inc.,
Petitioner,

vs.

United States District Court for the
Central District of California,
Respondent,
and
State of Arizona, State of California, et al.,
Real Parties in Interest
Before: SNEED and POOLE, Circuit Judges

Filed September 15, 1983

ORDER

Dow Jones & Co., Inc., intervenor below, petitions for a writ of mandamus directing the district court to rule on its motions for access to pretrial statements, briefs, and summary judgment motions, responses and exhibits in *In re: Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, MDL Docket No. 150.*

The petition for writ of mandamus is denied without prejudice to renewal if no ruling has been made by the

district court before the hearings on defendants' motions for summary judgment or, in any event, by October 31, 1983.

The motion of McClatchy Newspapers for leave to file a brief as amicus curiae is granted. The brief submitted is ordered filed.

If the petition for a writ of mandamus is renewed, McClatchy Newspapers may also file a brief as amicus curiae.

Supplemental Appendix H

In the United States Court of Appeals

For the Ninth Circuit

Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation
MDL 150-WPG (E.D. Cal.)

No. 84-5878
Mobil Oil Corp., Atlantic Richfield Co., *et al.*, Appellants,

v.

Dow Jones & Co., Inc., State of California, *et al.*, Appellees.
On Interlocutory Appeal From An Order Of The United States District Court For The Central District of California

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No. 84-7262
Dow Jones & Co., Inc., Petitioner,

v.

United States District Court for the Central District of California, Respondent,
and
Mobil Oil Corporation, *et al.*, Real Parties in Interest.

On Petition For Writ of Mandamus
Opposition of Plaintiffs City of Long Beach and State of California, Real Parties in Interest, To Emergency Motion to Recall Mandate
and
Petition for Clarification of Mandate

Plaintiffs, the City of Long Beach and the State of California, real parties in interest, hereby move this Court for permission to intervene to file a brief in opposition to Defendants' Mobil Oil Co. et al., Emergency Petition To Recall The Mandate and Supplemental Memorandum In Support of Emergency Motion Of Defendants Below For Clarification Of Jurisdiction, For Stay Pending Appeal, and Petition For Relief Necessary And Appropriate In Aid Of Appellate Jurisdiction, Pursuant to 28 U.S.C. §§ 1651.

Plaintiffs' motion to intervene is brought on the ground that only plaintiffs are in a position to correct certain of defendants' misstatements to this Court. Dow Jones the intervenor is unable to refute certain misstatements of defendants because it does not have access to pleadings and documents filed in this case. Plaintiffs' motion to intervene is brought on the additional ground that plaintiffs have an interest in the outcome of the motion. Under the district court order which is the subject matter of the mandate at issue in defendants' motion, plaintiffs must deliver to non-parties a copy of any documents cited in plaintiffs' briefs that were produced by such non-parties.

Plaintiffs also move this Court for clarification concerning this Court's mandamus issued on June 19, 1984. Without such clarification, plaintiffs are faced with irreconcilable orders of the District Court. On the one hand, a protective order has been entered since the start of MDL-150 which forbids the dissemination of documents produced in discovery. On the other hand, this Court's mandamus appears to have vacated a stay of the District Court's order which order both declassified certain documents and required plaintiffs to turn over certain documents to Dow

Jones. The complicating factor is that the District Court's order provided for a 60 day period for defendants to designate documents which they believed to be deserving of specal protection and a 70 day period after which documents not so designated in the 60 day period would be turned over to Dow Jones. If the mandamus of this Court was effective June 19, 1984, as plaintiffs maintain, then both the 60 and 70 day periods have already run. Because defendants did not designate any documents for further protection, plaintiffs believe that they are required to turn over to Dow Jones all of defendants documents subject to the Order forthwith. Defendants maintain that the 60 day and 70 day periods did not begin on June 19, 1984 and that the periods have not run. Only this Court can decide when the mandamus was effective and thus when the 60 day and 70 day periods began to run, plaintiffs need this Court to clarify whether Plaintiffs now have a duty to turn over documents to Dow Jones.

I.

DEFENDANTS' REVIEW OF DOCUMENTS WILL NOT BE LABORIOUS AND EXPENSIVE

Plaintiffs wish to bring to this Court's attention several facts—facts which are not available to intervenor Dow Jones—that refute defendants' argument that this Court should recall its mandate on the ground that the review of documents is "laborious and expensive." Defendants' Brief at 11. Without presenting this Court any reasons whatsoever, defendants contend that certain defendants cannot complete review of their documents in less than 60 days. Defendants' Brief at 12. In actual fact, the review process is not burdensome to defendants for the following reasons:

(1) The documents under discussion are limited mostly to those listed in plaintiffs' pretrial briefs. The documents listed in the pretrial briefs formed the universe out of which all subsequent summary judgment motions were based. The pretrial brief submitted by the City of Long Beach referred to less than 1400 documents. A number of these were third party documents or documents publicly available. On average, each defendant would have less than 200 documents used by Long Beach to review. The combined total for defendant documents cited by plaintiffs in the States' cases is less than 3400. Of these, over one thousand are "no bid" letters in which defendants declined to submit bids to public entities. In addition, a number of the remaining documents were third party documents and public record documents including Platts Oilgram and testimony before Congressional committees.

(2) The documents referred to in plaintiffs' pretrial briefs are already very familiar to defendants. Long Beach's pretrial brief was filed in June 1982 and summary judgment motions based on defendants documents cited in the pretrial brief were filed in December 1982. Plaintiffs filed their pretrial brief in the States' cases in January 1983 and two additional supplements, one in June 1983 and another in May of 1984. Again, these documents were subsequently cited in summary judgment motions.

(3) Defendants' argument falsely assumes that there are business justifications for protecting certain of their documents. In actual fact, the likelihood that there are any documents deserving of protection is exceedingly remote. Not one of defendants' documents cited by Long Beach was written after December 31, 1976. Fully one half of the doc-

uments were written in the 1960's and many are over twenty years old. Many of the defendants' documents contain damning admissions of their underpricing of California crude oil and of their conspiracy to effectuate their conspiracy through the device of trading crude oil which they called a "three-cut exchange." But none of this bears on business reasons for preserving confidentiality. The real reason why defendants want to keep Dow Jones from obtaining access to their documents is their fear of public condemnation of their illegal acts.

(4) The defendants' attempts to pretend that their documents contain sensitive business information that should be protected fails when one considers the fact that only they are their competitors in California and they already have each other's documents produced in MDL-150. The last effective competition to these seven defendants disappeared when Gulf and Getty were bought out by Socal and Texaco respectively. Thus there does not exist any company in competition with defendants which does not already possess the documents at issue. Defendants' purported need to maintain confidentiality is absurd.

(5) At least some of the defendants reviewed their documents for confidential business information in connection with a motion for access to documents filed by the State of Alaska. The State of Alaska sought and obtained access to documents filed in MDL-150: As in the present situation, the District Court granted defendants the opportunity to review their documents and submit a list of those documents which they regarded as particularly sensitive. Mobil Oil Co., the primary moving party here, submitted such a list to the District Court. After reviewing the documents

in camera, the District Court shielded some of those documents from discovery by the State of Alaska. The District Court's decision is attached as Exhibit A. Having completed this procedure already, Mobil cannot now complain about the burden it would have to endure to review documents.

(6) As plaintiffs will argue below, the mandate of this Court vacating a stay of the District Court's Order was issued and effective on June 19, 1984. Under the District Court's Order defendants had only 60 days to designate those documents which they wanted to protect. The District Court's Order is attached as Exhibit B. Because that 60 day period has already run, the defendants cannot now seek protection for any of their documents. Accordingly, defendants now have no reason to undertake a review of their documents.

II.

THIS COURT'S MANDATE WAS EFFECTIVE ON JUNE 19, 1984 AND HENCE, PLAINTIFFS MUST IMMEDIATELY HAND OVER TO DOW JONES THOSE DOCUMENTS WHICH WERE SUBJECT TO THE DISTRICT COURT'S ORDER

Plaintiffs seek a determination by this Court that indeed its mandate was issued and hence effective on June 19, 1984 and that, thus, the 60 day period in which defendants were required by the District Court to submit a list of documents for special protection has run and the 70 day period for handing non-designated documents to Dow Jones has also run.

The District Court's Order of April 6, 1984 provided that the defendants would have 60 days from entry of the Order

to submit a list of those documents that they contended are "trade secrets or so presently so commercially sensitive that their disclosure would cause substantial harm to defendants competitive positions." Order of District Court, Para. 3. Documents not submitted for further protection were to be declassified 70 days following entry of the Order. Order of District Court, Para 3. The District Court stayed its Order pending appeal.

In vacating the stay of the District Court's Order, by its mandamus on June 19, 1984, this Court thereby started the 60 and 70 day periods running. If plaintiffs are correct in their interpretation of this Court's mandamus, defendants may not now designate documents for further protection. Moreover, if plaintiffs are correct, the 70 day period has also run and therefore plaintiffs must turn over their pretrial briefs and summary judgment motions along with documents referred to therein to Dow Jones immediately.

Plaintiffs are presently in a situation where they must obtain some guidance from this Court. Under the protective order originally entered in this case, plaintiffs may not turn over documents produced in this litigation to third parties. However, under the District Court's Order, plaintiffs must turn over those documents to Dow Jones.[1]

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[1]It is time that the District Court ordered that the 60 day and 70 day periods began to run on September 6, 1984. See Para. 1, page 5 of Memorandum and Order Re Effect of Stay, attached to the Defendants' Brief. The District Court, however, conditioned its ruling as to when the 60 day and 70 day periods began on the premise that "issuance of the mandate in this case was a clerical error." Memorandum and Order Re Effect of Stay at 3. If the mandate was not issued as the result of a clerical error, then the mandamus was effective June 19, 1984.

Plaintiffs need guidance from this Court as to the effective date of its mandamus which vacated the stay of the District Court's Order. If, as plaintiffs maintain, the effective date of the mandamus was June 19, 1984, plaintiffs must hand over documents to Dow Jones forthwith. Plaintiffs respectfully request this Court to clearly state that the effective date of its mandamus was June 19, 1984 and that the 60 and 70 day periods provided in the District Court Order began to run as of that date.

Dated: September 18, 1984

Respectfully submitted,

Hoecker & McMahon
Gary W. Hoecker
M. Brian McMahon
Kenneth W. Kossoff
612 South Flower Street
Suite 800
Los Angeles, California 90017
(213) 617-8133

LeBoeuf, Lamb, Leiby & MacRae
Taylor R. Briggs
H. Richard Wachtel
Kimba M. Wood
520 Madison Ave.
New York, New York 10022

Robert W. Parkin
City Attorney
Robert G. Austin
Deputy Attorney
333 W. Ocean Boulevard
Eleventh Floor
Long Beach, California 90802

Attorneys for Plaintiff
The City of Long Beach

John Van De Kamp
Attorney General of the
State of California
Michael Spiegel—San Francisco
Sanford Gruskin—Los Angeles
Owen Kwon—Los Angeles

San Francisco: 6000 Building
San Francisco, CA 94102

Los Angeles:
3850 Wilshire Blvd.
Los Angeles, CA 90010

Attorneys for Plaintiff
The State of California

By /s/ M. Brian McMahon
On Behalf of Plaintiffs

Exhibit A

United States District Court for the
Central District of California

MDL Docket No. 150
Long Beach
CV 75-2232 WPG
In re
Coordinated Pretrial Proceedings
in Petroleum Products Antitrust Litigation

[Filed Oct. 24, 1983]

ORDER (PROPOSED)
COPY

Having reviewed defendant MOBIL OIL CORPORATION'S STATEMENT REGARDING CONFIDENTIALITY OF DOCUMENTS TO BE DISCLOSED TO THE STATE OF ALASKA and having reviewed *in camera* the documents identified in APPENDIX I, thereto,

IT IS HEREBY ORDERED that the exhibits identified on Appendix I attached hereto, and numbered 2, 3, 6, 7, 8, 9, and 11 are to be executed from the set of confidential summary judgment materials access to which was granted to the State of Alaska at the September 14, 1983, hearing.

10/24/83

WILLIAM P. GRAY
United States District Judge

Exhibit B

United States District Court for the
Central District of California

MDL-150 WPG
All Cases
In re:
Coordinated Pretrial Proceedings
in Petroleum Products Antitrust Litigation

[Filed April 6, 1984]

ORDER

Having considered (a) motions by the plaintiff-intervenor Dow Jones Company, Inc. for access to material sealed pursuant to a protective order entered by this court, (b) a motion by the State Case plaintiffs pursuant to Paragraph 3 of the MDL-150 protective order to declassify certain documents, (c) memoranda supporting and opposing said motions, and (d) oral argument of all interested parties, and having set forth the applicable law in the court's MEMORANDUM OF DECISION entered February 10, 1984, which is incorporated herein by reference,

IT IS HEREBY ORDERED:

(1) Pursuant to the common law right to access and the MDL-150 protective order the following documents are subject to declassification: (a) Plaintiffs' pretrial briefs, including Florida's Supplement to the State Cases Plaintiffs' Initial Pretrial Brief, and documents and exhibits attached to and cited therein; (b) all summary judgment material filed under seal, including motions for summary

judgment, opposing and supporting memoranda and documents cited in or attached thereto; and (c) material related to motions for judgment on the pleadings filed under seal, including such motions, opposing and supporting memoranda, and documents cited in and attached thereto. These documents shall be unsealed subject to the procedures set forth in pargraphs (3) and (4) below.

(2) The court is informed that the plaintiffs in the State Cases have served upon defendants' liaison counsel one copied set of the documentary exhibits to Plaintiffs' Initial Pretrial Statement that were filed with the court on November 3, 1983. Defendants shall promptly reimburse plaintiffs for one half the cost of reproducing such documents.

(3) Within sixty days following the entry of this Order, defendants shall identify and submit to the court and serve on plaintiffs those documents identified in paragraph (1) that they contend are trade secrets or presently so commercially sensitive that their disclosure would cause substantial harm to defendants' competitive positions. When submitting the documents, defendants may also submit memoranda explaining why categories of material ought to remain sealed and identifying which documents fall into each category. The defendants shall serve any such memoranda upon liaison counsel in both cases. Documents identified in paragraph (1) but not submitted for further protection pursuant to this paragraph or paragraph (4) shall be declassified and unsealed seventy days following the date of entry of this Order.

(4) Prior to submissions to be made pursuant to paragraph (3), each party shall review the materials identified

in paragraph (1) that it submitted to the court and deliver to any non-party a copy of any documents cited therein or attached thereto that contain information produced by such non-party covered by the MDL-150 protective order. Such non-party may then take part in the briefing procedure described in paragraph (3) by moving to intervene for that limited purpose. Upon intervention, a third party seeking to retain the confidentiality of documents shall agree to pay to the party incurring such costs a reasonably proportionate share of the expenses entailed in the review, copying and delivery of documents to the third party.

(5) With respect to any document called to the attention of the court pursuant to paragraphs (3) and (4) hereof, the court will take such action as it deems appropriate regarding declassification, depending upon the number of documents involved and the showings made.

(6) This Order is hereby stayed for thirty days, and thereafter pending appellate review if defendants shall have joined in a request to the Court of Appeals for an expedited review.

DATED: April 6, 1984

/s/ WILLIAM P. GRAY
William P. Gray
United States District Court

Supplemental Appendix I

United States District Court
Central District of California

CV84-2232-WPG Long Beach
Case Number MDL Docket No. 150 WPG
In Re: Coordinated Pretrial Proceedings in
Petroleum Products Antitrust Litigation
Plaintiff(s)

vs

Defendant(s)

Notice of Entry

To the above named parties and to their attorney(s) of record:

You are hereby notified that Memorandum for Decision on Defendants' Motion for Partial Summary Judgment and Findings of Fact and Conclusions of Law in the above entitled case was entered in the docket on 7-19-84.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties.) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 29.2. If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

Supplemental Appendix J

United States District Court
Central District of California

MDL-150-WPG Long Beach
In Re Coordinated Pretrial Proceedings in
Petroleum Products Antitrust Litigation

[Filed Aug. 31, 1984]

Memorandum of Decision

The defendants have moved for summary judgment principally on the basis of the deposition testimony of the plaintiffs' experts, Messrs. Anderson and Rapp of National Economic Research Associates (NERA). The defendants moved to exclude the testimony of these two economists and the portions of the NERA Report that they authored concerning both liability and damages. They also sought to exclude the damage studies done by plaintiffs' other expert economists, T. Saving and Putnam, Hayes & Bartlett. These motions were argued on July 24, 25 and 26, 1984 and taken under submission. Subsequent to the hearing, I have studied the transcripts thereof, have given renewed consideration to the briefs submitted by the parties, and have sought to acquire a better understanding of the rather technical problems involved in the issues presented. The motions now are denied.

The defendants contend that the plaintiffs' economists recanted, or made admissions contrary to, some major assumptions and conclusions of the NERA Report and the plaintiffs' theories regarding both the fact and the amount of damage. I am not able to conclude that the "admissions"

of the experts are as categorical or substantial as the defendants contend. Some of the deposition answers upon which the defendants rely were given in response to questions that were long, involved and based upon hypotheses that made the answers conducive to interpretation. In a few passages cited by the parties, the hypothetical facts upon which the deponent was to base his answer were unsubstantiated in the record. Other answers were qualified or were contradicted in different parts of the very extensive interrogations. It is beyond doubt that portions of the deposition may call forth some interesting cross-examination at trial. However, taken as a whole, the testimony generally was consistent with the NERA Report, and I decline to base summary judgment upon isolated comments that can be considered to be at variance with the main thrust of the theories embraced by the plaintiffs and their expert witnesses.

If I were to conclude that summary judgment should be granted, I would feel obliged to articulate with considerable particularity the reasons why the deposition testimony is inconsistent with the Report or with reality. However, under present circumstances, it is believed more appropriate to refrain from doing so. In the first place, having decided that the plaintiffs' witnesses have not nullified their own methodology, and having no reason to conclude at this stage that the expert opinion is other than admissible, the weighing of the plaintiffs' experts' testimony and the evaluation of their opinions against the defendants' theories become the responsibility of the trier of fact. *See In re Japanese Electronic Products Litigation*, 723 F.2d 238, 275-84 (3d Cir. 1984). It therefore is not considered appropriate or necessary that I express my own views at this

time as to the strengths or weaknesses of the plaintiffs' positions on the ultimate questions. Second, if I were to undertake to set forth here in detail the reasons why I believe that many factual issues remain, the preparation of this memorandum would take a considerable amount of time. For personal reasons, I will not be able to work on this case for about a month, and I believe that it is better for the parties to have a prompt decision than to require them to wait a much longer time for a more thorough explanation. Accordingly, I shall advert somewhat telegraphically to the major points raised by the parties in order to give counsel whatever assurance I can that the matters have been given thorough consideration.

I. MARGINAL VALUES IN REDUCTION v. IN TOPPING

The plaintiffs' case on liability and for damages, at least as implicated by this dispute, is based largely on the following propositions:

(a) Every refiner of crude oil may be expected to attempt to maximize its profits.

(b) In such effort, the competitive refiner will keep on buying crude oil as long as the marginal value product of that crude oil does not fall below the price at which it can be purchased. That is, the competitive refiner will equate marginal value with price by adjusting its consumption of crude.

(c) Here, data from defendants disclose that during the times concerned, their marginal refinery values for heavy crude oils were substantially in excess of the posted prices for those oils.

(d) The foregoing circumstances are evidence of anti-competitive behavior and, together with other facts, point to collusion in violation of the antitrust laws.

(e) From the above, it is possible to construct a reasonable model for estimating the "but for" prices of heavy crude oil. In simple terms, had the defendants been acting competitively, the prices of crude oil would have risen to the level of the marginal value of the oil, and the "but for" competitive price is roughly equal to that marginal value.

The defendants' position is that these higher internal refinery values, calculated in "reduction" refineries, cannot be used either as evidence of conspiracy or as estimates of the "but for" prices. Defendants first argue that the refinery values of the smaller, less sophisticated refiners ("toppers") are the proper indicators of competitive market value. The question is, therefore, whether the expert economists agreed or admitted, as the defendants assert, that in the "but for" competitive world the market prices would have been determined by the (lower) marginal values of topping refiners.

I have reviewed substantial portions of the deposition transcripts, and I find the expert testimony consistent with the plaintiffs' position that in competition, all refiners would have the same values for a given crude oil at the margin—even though some of the less efficient refiners might not have survived in that "but for" world. The transcripts show that Mr. Anderson distinguished between what did happen and what would have happened, in his opinion, in a competitive market. *See, e.g.,* Anderson deposition at 1911-18, 2124-27, 2237-41. Mr. Rapp, as well, evi-

dently kept that distinction in mind during the part of his deposition cited by defendants. *Compare* Rapp deposition at 565-75 *with id.* at 1327. In fact, the only passage from the thousands of pages of deposition transcript here that reveals agreement with defendants' proposition regarding marginal values in a "but for" world is a rather vague statement by Mr. Rapp, at page 1924 of his deposition, that in the 1960's and 1970's, the demand of toppers "should have contributed to the price" of heavy crude oil "in competition." This simply is not enough from which to conclude that the experts admitted that their methods and data were "fatally flawed."

The defendants' second argument regarding the topping value of crude oil is that the plaintiffs cannot postulate a "but for" world in which the toppers would have been driven out of business as a result of the defendants consuming more heavy crude and bidding up its price, since plaintiffs' experts have conceded that they have no reason to believe that defendants conspired to restrain their demands for crude oil. Therefore, according to the defendants, plaintiffs cannot maintain that toppers would not have existed in a competitive market, and thus the competitive market price would have reflected the value of the oil to the toppers.

Turning to the depositions, it is clear that the economists testified that they had no reason to believe that the defendants conspired with the purpose of underconsuming heavy crude oil. *See, e.g.*, Anderson deposition at 2344, 2354, 2362-63; Rapp deposition at 1126. Neither do the experts think that the aggregate market consumption of crude oil would have been much higher had the market been competitive, given the relative inelasticity of supply. *See, e.g.*, Anderson

deposition at 2338-39, 2344. But, they believed that each defendant restrained its demand for heavy crude as a by-product of the conspiracy not to bid up the prices of heavy crudes. *See, e.g.,* Anderson deposition at 2366-72. This testimony is consistent with the plaintiffs' theory that *competing* refiners would purchase crude oil to the point where its marginal value equalled its market price, and that had the defendants acted accordingly, the prices of heavy crudes would have been higher.

II. THE "STEP" FUNCTION

The defendants contend that the graphic representation of their marginal values for a given crude would not descend in a smooth line or a curve, but rather would descend in "step" fashion, reflecting the different operating modes in a reduction refinery. Mr. Anderson did testify to his understanding that there were steps, *see* Anderson deposition at 84-85, but he also expressed his view that a refiner probably has a lot more flexibility in deciding which modes or combinations of modes to utilize than is indicated by the simple four-step illustration submitted by the defendants. *See e.g.,* Anderson deposition at 1175, 1972, 1975, 1981. I am aware of no evidence as to how many such steps there are in any refinery, how broad they are, or how deep the precipices. These questions are important in considering the relationships between "reduction" and "topping," discussed in Section I, *supra.* They also are important to the matter of fixed costs and return on investment, discussed in Section III, and in considering the significance of supply elasticity, treated in Section IV. The "step" concept clearly presents factual issues that constitute further reason why summary judgment is inappropriate.

III. FIXED COSTS AND RETURN ON INVESTMENT

I am unable to accept the defendants' contention that the refinery data that plaintiffs used were inappropriate because the figures failed to take into account fixed costs and return on investment, which must be recovered if the refiner is to stay in business. For purposes of the joint motion, defendants conceded that their refinery values (used by the plaintiffs) were in fact values calculated at the margin. If the data are marginal values, or if they are suitable surrogates, fixed costs and return on investment are not relevant; these expenses should be covered by average values, not marginal values, as a matter of elementary economic theory.

The defendants, however, take a different tack, arguing that the usual economic theory does not apply: due to the "step" function, their marginal values were the same as their average values for crude oils across each "step" or refining mode. Thus, according to the defendants, unless they recovered their fixed and capital costs in each mode they would not recover these costs at all. The defendants assert that Mr. Anderson admitted as much in his deposition, and that they are therefore entitled to a ruling barring the admission of any expert study or opinion of damages based on the refinery value data collected by the plaintiffs from the defendants.

It is evident from the transcript that the defendants have simplified the economics (for which, perhaps, I should thank them) and the responses of the expert. Mr. Anderson did not agree that the reduction refinery values had to exceed price by an amount sufficient to cover these costs over each "mode." *See* Anderson deposition at 1979-81.

The qualified response he gave there is consistent with the proposition that the reduction refiner can recover its costs with revenue represented by the difference between the marginal values and the higher infra-marginal values, *see id.* at 1981, from which we accordingly infer that he did not concede the main point urged by the defendants here.

Insofar as Shell and Socal do not join in the arguendo assumption that their refinery values are marginal values, their contentions raise material issues of fact that are somewhat tangential to the thrust of the instant debate. This is, to be sure, an important issue, and I am not precluding reargument of the question at a later date.

IV. SUPPLY ELASTICITY

The defendants argue that NERA's conclusion that the supply of heavy crude oil in California was price-inelastic is (a) crucial to the damage estimate; (b) extreme; and (c) not supported by—or is contradicted by—the evidence. Plaintiffs' experts did acknowledge that in order for their calculations of damage to be reliable, the supply of heavy crude oil in California would have to have been substantially price-inelastic during the relevant period. NERA Report at p. 433. The defendants, relying on *Murphy Tugboat v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1081 (1982), request that the NERA testimony on supply elasticity (and any evidence for which that is a foundation) be excluded. This I decline to do. Unlike the situation in *Murphy Tugboat*, there is evidence in the record to support the opinion.

Plaintiffs have proffered empirical evidence showing that despite very significant increases in the prices during the period 1970-80, the production of heavy crude oil in Cali-

fornia remained quite constant. And, during the 1960-70 period, when prices for heavy crude were stable, the production increased dramatically. In addition, there is some documentary evidence to substantiate this conclusion. *See* the Union Oil Company memorandum concluding that "[t]he supply of heavy crude oil has not been affected by the posted price for this oil." (Quoted in NERA Report at p. 433.) On the other hand, there is evidence that officials of the City and State made opposite representations to the federal government in the 1970's in an attempt to obtain relief from the price ceilings. At best, the evidence is in conflict as to what extent the supply of heavy crude oil was responsive to price.

The defendants further allege that the NERA economists failed to deal properly with four factors that should have led them to conclude that there was a higher elasticity: (1) NERA erred in ignoring a possible shift in the supply curve; (2) NERA underestimated the natural production decline rate; (3) NERA overestimated the amount of crude oil that could respond to higher prices by virtue of the federal price controls; and (4) NERA underestimated increased oil production costs in using the GNP-deflator to account for inflation.

I am unable to agree that the NERA experts did not give consideration to these factors and make professional decisions regarding their treatment. For example, the testimony of Mr. Rapp at pages 87-120 and 370-71 of the transcript shows that he did not concede an error in this regard to a shift in supply. As for the natural production decline rate, it seems that Mr. Anderson maintained throughout that his regression methodology was appropriate and reli-

able for his professional purposes. *See, e.g.*, deposition at 4326-36, 4474-75, even though, as he candidly admitted, one of the computer simulations produced an aberrational result. *See id.* at 4448-49. Regarding the effect of federal price controls, Mr. Anderson maintained during his deposition that he had made the proper comparison between "new oil" prices and incremental production. *See id.* at 4073-78, 4295-96. Mr. Anderson did not concede that if he had made the adjustments that the defendants suggest are necessary, he would have reached a conclusion that is more favorable to the defendants. *See id.* at 4166-70. Nor did Mr. Anderson concede that had he used an index of cost increases that was higher than the GNP deflator, NERA's estimate of supply elasticity would have been higher. *See id.* at 4213, 4215. In sum, the NERA opinion on supply inelasticity has not been shown to be so fatally flawed as would warrant exclusion. The defendants' challenges go to the weight to be given the opinions, and those are not questions suitable for decision on this motion.

V. CONCLUSION

The defendants have expressed their concerns about the great expense of this long-pending litigation. I share these concerns, and I am increasingly mindful of the complexities and difficulties in terms of proof of liability and damages. However, I conclude that the deposition testimony of Messrs. Anderson and Rapp, two seemingly competent and conscientious economists, does not provide a basis for summary judgment. I also deny the motion to strike their testimony and that of the other experts.

To the extent that the presentation and argument during the July 1984 hearings added to the existing debate regard-

ing the legality of the three-cut exchange, I will discuss them in a separate memorandum.

With respect to the recent de-designation by the plaintiffs of certain expert witnesses, it is ordered as follows:

1. No additional experts may be designated by the plaintiffs.

2. If the deposition of an expert has been taken or has commenced, there will be no transfer of subject matter from such expert to another expert. The reason for this is to avoid the need for the defendants to start again to depose a new witness in covering subject matter that previously has been developed in whole or in part.

3. No report will be received into evidence that has been prepared by an expert whom the defendants have not had an opportunity to depose.

4. Any further depositions of experts designated by the plaintiffs will be limited as follows: Each defendant will be entitled to depose such expert for not more than one day of not more than six hours. The defendants shall be entitled to defer to each other in the utilization of their respective allotted days.

6. (*sic*) All of the foregoing is subject to modification by the court on good cause shown.

Dated: August 30, 1984

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge